



**Mware v Ajode (Environment and Land Appeal E20 of 2020)  
[2023] KEELC 18239 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18239 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E20 OF 2020  
SO OKONG'O, J  
JUNE 15, 2023**

**BETWEEN**

**THOMAS AKOMO MWARE ..... APPELLANT**

**AND**

**SCHOLASTICA ROSE AJODE ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order of R.K.  
Ondieki, SPM made in Kisumu CMCELC No. 37 of 2020)*

**JUDGMENT**

- 1 The Respondent filed a suit in the lower court against the Appellant namely, Kisumu CMCELC No 37 of 2020 seeking the following reliefs;
  - a. A permanent injunction restraining the Appellant by himself or his agents, servants, employees or persons claiming through him from alienating, encroaching, erecting a fence onto, creating a road, cultivating or using part of or whole parcel or acting in a manner which is inconsistent with the Respondent's rights over all that parcel of land known as Title No Kisumu/ Konya/ 2208 (hereinafter referred to as 'the suit property').
  - b. An order of eviction.
  - c. General damages for deliberate and conscious trespass into the suit property.
  - d. Interest on (c) above and costs of this suit.
- 2 In her plaint, the Respondent averred that at all material times relevant to the suit, she was the registered proprietor of the suit property and the adjacent parcel of land known as Title No Kisumu/ Konya /2207(hereinafter referred to as 'Plot No 2207' where the context so permits) while the Appellant was the registered proprietor of all that parcel of land known as Title No Kisumu/ Konya/6615(hereinafter referred to as 'Plot No 6615'). The Respondent averred that the Appellant



- had deliberately created an access road on the suit property and had further proceeded to fence off part of the suit property measuring approximately 0.21 of a hectare and annexed it to form part of Plot No 6615.
- 3 The Respondent averred further that the Appellant had also erected a temporary structure on the annexed portion of the suit property thereby denying the Respondent the unrestricted user, possession and peaceful occupation of the said portion of the suit property.
  - 4 The Appellant entered an appearance and filed a defence and a counterclaim against the Respondent on July 2, 2020. The Appellant denied the Respondent's claim in its entirety. The Appellant averred that the suit property, Plot No 2207 and another parcel of land known as Title No 2209 (hereinafter referred to as 'Plot No 2209') were one large parcel of land owned by his grandfather one, Nyandege Nyandege before land adjudication and demarcation. The Appellant averred that his said grandfather had two sons, Owiro Nyandege and Mware Nyandege. The Appellant averred that the said parcels of land were part of his ancestral land. The Appellant averred that the said Owiro Nyandege also had two sons namely, Michael Adoyo and John Oremo Owiro and that Mware Nyandege had one son, Thomas Akomo Mware (the Appellant). The Appellant averred that following the adjudication and demarcation of the said hitherto large parcel of land, the same was subdivided into 3 portions, two of which were registered in the names of the two sons of Owiro Nyandege to be shared out between them and one portion was registered in the name of the Appellant who was the son of Mware Nyandege. The Appellant averred that during that exercise, the suit property was registered in the name of Michael Adoyo Owiro and Plot No 2207 was registered in the name of John Oremo Owiro. The two parcels of land measured 0.45 of a hectare in total. The Appellant averred that he was registered as the owner of Plot No 2209 measuring 0.46 of a hectare which he later subdivided to give rise to the parcels of land known as Title No Kisumu/Konya /5421,5423,6615 and 6616 (hereinafter referred to as Plot Nos 5421,5423,6615 and 6616 respectively).
  - 5 The Appellant averred that the suit property changed hands several times before the same was registered in the name of the Respondent. The Appellant averred that Plot No 2207 similarly changed hands and was registered in the name of Claris Awino Ayieko at the time of his defence. The Appellant averred that he had never had any boundary dispute with his neighbours since 1994 and that the boundary dispute brought up by the Respondent was from nowhere and was motivated by nothing other than greed. The Appellant averred that the Respondent's intention was to use the local administration and/or Ministry of Lands officials to take away a portion of Plot No 6615 owned by the Appellant using intimidation, tricks and brute power.
  - 6 The Appellant averred that when the Government Land surveyor visited the disputed boundary site on October 30, 2019, appropriate beacons were placed in the presence of both parties confirming the old boundaries that were marked by existing euphorbia plants. The Appellant averred that upon confirmation of the actual boundaries by the Government surveyor and the Ministry of Lands officials and placing of fresh beacons, the Respondent surrendered 20 cedar poles or posts to the Appellant as an act of reconciliation and/or compensation to the Appellant for wasted effort and groundless allegations. The Appellant averred that he was surprised a few weeks later when the Respondent secretly brought another surveyor to re-demarcate the said parcels of land in the process of which they purported to create new boundaries. The Appellant averred that the Respondent thereafter placed fencing poles inside Plot No 6615 owned by the Appellant and/ or overlapped on the Appellant's old fence.
  - 7 The Appellant averred that the only permanent solution to the dispute between the parties was to conduct a re-survey of the whole of Plot No 2207 and the suit property having a combined size of 0.45



of a hectare and Plot No 6615 and Plot No 6616 with a combined size of 0.46 of a hectare afresh to establish their actual sizes in accordance with the land office records.

- 8 In his counterclaim, the Appellant reiterated the contents of his statement of defence and prayed for judgment to be entered in his favour against the Respondent for:
- a. A permanent injunction restraining the Respondent from claiming, fencing off and or in any other way interfering with the Appellant's peaceful use and occupation of Plot No 6615 and from trespassing thereon and/or that an order be given to re-open the closed public access road and or easement forthwith.
  - b. Eviction of the Respondent from Plot No. 6615.
  - c. The erected fence on Plot No 6615 be removed within 30 days from the date of the judgment and failure to do so the same be removed by the Appellant forthwith at the cost of the Respondent.
  - d. Compensation to be assessed by the court for the unlawful occupation of Plot No 6615 from November 2019.
  - e. Costs of the Counterclaim.
  - f. Interest on (d) above at court rates.
  - g. Any other or further relief the court may deem just and expedient to grant.
- 9 Together with the Plaint, the Respondent brought an application by way of Notice of Motion dated June 5, 2020 seeking an order of injunction restraining the Appellant from claiming, putting up a fence, planting crops, ploughing, taking possession, creating an access road, trespassing onto the suit property pending the hearing and determination of the suit. The application that was opposed by the Appellant was allowed as prayed by the lower court on July 2, 2020.
- 10 On July 27, 2020, the Appellant brought an application in the lower court by way of a Notice of Motion dated July 24, 2020 seeking the following orders;
1. This Honourable Court be pleased to issue an order that the Appellant be at liberty to engage a qualified surveyor of his choice to re-survey land parcel numbers Plot Nos 6615,6616,2207,2208,5421 and 5423 to determine who had encroached on which parcel of land and to what extent, whether or not the Appellant had created an access road on the suit property owned by the Respondent and whether or not the Respondent had closed an access road in the area.
  2. This Honourable Court be pleased to reserve a date to visit Plot No 6615 and Plot No 2208 and see for itself the land and/or boundary in dispute.
  3. That costs of this application be in the cause.
- 11 The application that was supported by the affidavit of the Appellant sworn on July 24, 2020 was brought on several grounds. The Appellant averred that the court had granted the Appellant leave to file other documents including a survey report. The Appellant averred that he engaged a surveyor one, Francis Owara Gularira who did the requisite survey work on the disputed boundary between the suit property and Plot No 6615. He stated that the said surveyor prepared a survey report dated July 1, 2020 but had vowed never to attend court to produce the said survey report in evidence on the ground that the said report contradicted a similar report prepared earlier by his boss one, Mbok Geoffrey on behalf of the Respondent.



- 13 The Appellant averred that he approached other licensed surveyors who were willing to prepare another survey report provided there was a court order directing them to do so for fear of violence or intimidation. The Appellant averred that the Respondent would not be prejudiced in any way if the orders sought were granted since the survey would assist the court and all the parties in thrashing out all the issues in controversy. The Appellant averred that the orders if granted would also aid in achieving the constitutional provisions on access to justice and/ or a right to a fair hearing.
- 14 The application was opposed by the Respondent through a Replying Affidavit sworn on September 4, 2020. The Respondent contended that the application was misplaced in that the same offended the order that was issued by the court on July 27, 2020 to which there was no appeal. The Respondent averred that the application was *res judicata*.
- 20 The Respondent contended further that the Appellant wanted the court to assist him collect evidence while the matter was still pending before the court. The Respondent contended that the court did not have jurisdiction to grant the orders sought. The Appellant filed a supplementary affidavit on September 7, 2020 in which he denied that the application was *res judicata*. The Appellant averred that the Respondent did not want the truth to come out. The Appellant averred that he had obtained leave of the court to file a survey report and that his surveyor required an order of the court to commence work.
- 21 The lower court heard the Appellant's application and dismissed the same with costs in a ruling that was delivered on December 7, 2020. The lower court found that the Appellant's application extended to other parcels of land that were not the subject of the lower court suit and that the effect of the orders that were sought by the Appellant if the same were granted would have been to compel a witness to collect evidence to be tendered by the Appellant in the lower court. The lower court also found that the orders sought if granted would amount to a review of the orders of injunction earlier made by the court on July 27, 2020. The lower court held that the burden was upon the Appellant to prove his case and that the court could not assist the Appellant in that endeavour.
- 22 The Appellant was aggrieved by the said ruling of the lower court and filed the present appeal on December 23, 2020. In his Memorandum of Appeal dated December 22, 2020, the Appellant challenged the lower court's ruling and order on the following grounds;
1. The Learned Magistrate erred in law and fact in dismissing the Appellant's application on flimsy grounds.
  2. The Learned Magistrate's decision to dismiss the Appellant's application contradicted the orders of the same court made on July 27, 2020.
  3. The Learned Magistrate erred in law in refusing to allow the Appellant to engage a qualified surveyor to resurvey Plot Nos 6615, 6616, 2207, 5421, 5422 and 5423 as pleaded in the defence and other documents on record showing that they were previously part of one large parcel of land.
  4. The Learned Magistrate erred in law and fact in failing to treat the parties in the suit equally as required in law.
  5. The Learned Magistrate erred in law and fact in failing to take cognizance of the Appellant's assertion and/or pleading and/or position that the report by the County Surveyor and the Land Registrar was doctored.
  6. The Learned Magistrate erred in law and fact in failing to grant the Appellant a fair hearing and access to justice as required in law.



- 23 The Appellant urged the court to allow the appeal, set aside the ruling dated December 7, 2020 and all consequential orders and order that the Appellant is entitled to engage a qualified surveyor to re-survey Plot No 6615 owned by him and produce a report to protect the Appellant's interests in the said parcel of land.
- 24 The Appeal was heard by way of written submissions. The Appellant filed his submissions on February 16, 2023 while the Respondent filed her submissions on February 27, 2023.

**The Appellant's submissions:**

- 25 The Appellant submitted that the lower court erred in law by denying him an opportunity to engage a qualified surveyor to re-survey the suit parcels of land and file a report in court to enable the court determine the issues in contention conclusively. The Appellant submitted that there were two reports filed in court one by the County Surveyor, Geoffrey Mbok in which he found that the owner of Plot No 6615 had extended an access road created to serve the suit property to serve his plot thereby encroaching into the suit property. The Appellant submitted that the second report was by Francis Owara Gularira from the same office of the County Surveyor in which he found that the owner of the suit property had encroached on Plot No 6615 to the extent of 0.20 of a hectare.
- 26 The Appellant submitted that the issue before the lower court for determination was whether the Appellant had trespassed into the suit property owned by the Respondent. The Appellant submitted that the dispute revolved around the boundary between the suit property and Plot No 6615. The Appellant submitted that Article 50 of the Constitution provides for a fair hearing. The Appellant submitted that it was his right to bring any documents and witnesses he desired in his defence against the Respondent's claim in the lower court. The Appellant submitted that the hearing was yet to begin and as such the Respondent was not going to suffer any prejudice if his application in the lower court was allowed.

**The Respondent's submissions:**

- 27 The Respondent submitted that the effect of a re-survey to land is that after a re-survey, the surveyor will recommend either that the land maintains its acreage, the acreage be reduced or increased and thereafter a new title be issued with the recommended acreage.
- 28 The Respondent submitted that the owners of Plot Nos. 6616, 5421, 5422 and 5423 also sought to be re-surveyed were not parties to the lower court suit. The Respondent submitted that the lower court was being asked to issue orders that were going to adversely affect strangers to the lower court suit. The Respondent submitted that the lower court was right in its finding that the Appellant wanted to use the court to collect evidence for him. The Respondent submitted that the court should direct the Appellant to use the documents in his possession in his Defence and if he wants evidence from any other source, he should obtain the same by himself without involving the court.

**Analysis and Determination:**

- 29 I have considered the pleadings and proceedings of the lower court, the ruling of the court and the Memorandum of Appeal by the Appellant. I have also considered the submissions by the advocates for the parties. In my view only one issue arises from all the grounds of appeal put forward by the Appellant. The issue is whether the lower court erred in refusing to grant the Appellant leave to engage a qualified surveyor to re-survey Plot Nos 6615, 6616, 2207, 5421, 5422 and 5423.



30 In his application in the lower court, the Appellant had invoked the inherent power of the court and the overriding objectives of the Civil Procedure Act. Section 3A of the Civil Procedure Act provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

31 To bring himself under this rule, the appellant had to establish that the orders that he had sought in the lower court were either necessary for the ends of justice to be met or to prevent abuse of the court process. For the reasons that I will give later in the judgment, I am not satisfied that that was the case.

32 Section 1A of the Civil Procedure Act provides as follows:

1A.

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B of the same Act on the other hand provides as follows:

1B.

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
  - (a) The just determination of the proceedings;
  - (b) The efficient disposal of the business of the Court;
  - (c) The efficient use of the available judicial and administrative resources;
  - (d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) The use of suitable technology.

33 The dispute between the parties in the lower court in my view concerned the boundaries of the suit property (Plot No 2208) owned by the Respondent and Plot No 6615 owned by the Appellant. A dispute of this nature should normally be resolved by the Land Registrar under section 18 of the Land Registration Act, 2012 which provides as follows:

18.

- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.



- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

34 Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, Cap 299.

35 From the material on record, it appears as if the dispute had been referred to the Land Registrar for determination under the said provision of the *Land Act*, 2012. In a report submitted to the Respondent on October 31, 2019, the Land Registrar found that the owner of Plot No 6616 had created an access road through the suit property with the permission of the Respondent and that the Appellant who is the owner of Plot No 6615 had extended this road to Plot No 6615 without the consent of the Respondent thereby encroaching on the suit property. This report dated October 31, 2019 appears to have been prepared at the instance of the Respondent. The Respondent used the same to support her application for injunction.

36 The other report on record is dated July 1, 2020. This one was prepared by Francis Owara Gularira and the same was addressed to the County Surveyor, Kisumu. According to the Appellant, this report was prepared at his request. The scope of the report appeared to have been limited to determining the boundary of Plot No 6615. According to this report, the access road to Plot No 6615 had been blocked and fenced by the owner of the suit property who is the Respondent herein and that the suit property had encroached onto Plot No 6615 to the extent of 0.20 hectares. The Appellant used this report to support his application the ruling in which is the subject of this appeal.

37 From the evidence on record it is only the owners of the suit property, Plot No 2207 and Plot No 6615 who are known. The main parcels of land whose boundaries were in dispute are the suit property and Plot No 6615. In his application, the Appellant introduced other parcels of land whose owners were unknown and which were not the subject of the lower court suit. These were Plot Nos 5421, 5422, 5423 and 6616. The appellant sought leave of the court to engage a surveyor of his choice not to determine the boundaries of the suit property and Plot No 6615 but to re-survey, not only the suit property but also Plot Nos 5421, 5422, 5423 and 6616 to establish various aspects of the dispute before the lower court.

38 The orders that were sought before the lower court were discretionary. In *Patriotic Guards Ltd v James Kipchirchir Sambu [2018]eKLR* the court stated as follows:

It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.'

39 In *Mbogo v Shab [1968] EA 93* the court stated as follows at page 94:

'I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'



- 40 I am not persuaded that the lower court failed to exercise its discretion properly. The court had to balance the Appellant's right to bring the best evidence he could in his defence and in proof of his counter-claim in the lower court with the need to protect the rights of parties not before the court and the status of the court as an independent arbiter of disputes. I am in agreement with the Respondent that the scope of a re-survey of land is wider than the determination of boundaries and that the Appellant's prayer to be allowed to re-survey the suit property and other parcels of land that I have mentioned was not backed by his defence and counter-claim. I am also in agreement with the Respondent that the orders sought by the Appellant were likely to affect the owners of Plot Nos 5421, 5422, 5423 and 6616 whose identities were not known and who were not before the court to make representation. I am also in agreement with the lower court that the manner in which the orders sought by the Appellant in the lower court were couched were such that the court was not only called upon to order that the Appellant was at liberty to appoint a surveyor of his choice but also to set the scope of the work of the said surveyor.
- 41 I am of the view that unless parties had entered into a consent for such a survey to be done and the scope thereof or the court on its own motion had ordered the survey for reasons given in the order, the court could not order the Appellant's witness to collect and bring to the court a particular type of evidence. This is not the role of the court. The Appellant was at liberty to carry out a survey using a surveyor of his choice the scope of which had to be limited to the nature of the dispute and the parties before the court without involving the court. I am of the view that the lower court would not have hesitated to order that the Appellant's surveyor be provided with security to enable him to carry out the survey. Faced with an application seeking orders; that were likely to affect parties not before it, that had the effect of dragging the court to the arena of litigation, and which were not based on the pleadings, the lower court exercised its discretion properly in dismissing the application.
- 42 The orders that were sought by the Appellant were neither going to serve the ends of justice nor prevent abuse of the process of the court. The orders were also not going to facilitate the just, expeditious, proportionate and affordable resolution of the dispute between the parties. The threshold for the exercise of the court's inherent power was therefore not met. Due to the foregoing, the Appellant's appeal has no merit. I believe however that all is not lost for the Appellant. The court has the power to Summon Francis Owara Gularira to appear in court as his witness to produce the report dated July 1, 2020. The Appellant is also at liberty to resurvey his own parcel of land and in case he requires security to do so, the lower court should not hesitate to make an order for the same to be provided by the nearest Police Station.
- 43 The upshot of the foregoing is that the Appeal before me fails on all the grounds put forward by the Appellant. The Appeal is dismissed. Each party shall bear its own costs. The Deputy Registrar shall forthwith return the lower court file back to that court for further action.

**DELIVERED AND DATED AT KISUMU THIS 15<sup>TH</sup> DAY OF JUNE 2023**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Odeny for the Appellant

Mr. Anyul for the Respondent

Ms. J. Omondi-Court Assistant

